

FEDERAL COURT OF AUSTRALIA

Kang v Minister for Immigration and Citizenship [2013] FCA 711

Citation:	Kang v Minister for Immigration and Citizenship [2013] FCA 711
Appeal from:	Minister for Immigration v Kang & Anor [2012] FMCA 732 Minister for Immigration v Kang & Anor (No. 2) [2012] FMCA 918
Parties:	JAGMEET SINGH KANG v MINISTER FOR IMMIGRATION AND CITIZENSHIP and MIGRATION REVIEW TRIBUNAL
File number:	VID 851 of 2012
Judge:	NORTH J
Date of judgment:	22 May 2013
Date of hearing:	22 May 2013
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	No Catchwords
Number of paragraphs:	34
Counsel for the Appellant:	Mr J R Young
Solicitor for the Appellant:	G & S Law Group
Counsel for the First Respondent:	Mr C Horan
Solicitor for the First Respondent:	Clayton Utz

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 851 of 2012

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

**BETWEEN: JAGMEET SINGH KANG
Appellant**

**AND: MINISTER FOR IMMIGRATION AND CITIZENSHIP
First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGE: NORTH J

DATE OF ORDER: 22 MAY 2013

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. Subject to paragraph 2, the appeal is dismissed.
2. Paragraph 2 of the orders of the Federal Circuit Court (formerly the Federal Magistrates Court) dated 24 August 2012 be varied by deleting the words following "according to law".
3. The appellant pay the first respondent's costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

**BETWEEN: JAGMEET SINGH KANG
Appellant**

**AND: MINISTER FOR IMMIGRATION AND CITIZENSHIP
First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGE: NORTH J

DATE: 22 MAY 2013

PLACE: MELBOURNE

REASONS FOR JUDGMENT

INTRODUCTION

1 1 Before the Court is an appeal from orders made by the Federal Circuit Court, previously known as the Federal Magistrates Court, on 24 August 2012. Those orders quashed a decision of the Migration Review Tribunal (the Tribunal) made on 24 November 2011. The Tribunal set aside the decision of the delegate of the first respondent, the Minister for Immigration and Citizenship, (the Minister) to cancel the appellant's Subclass DD 880 Skilled - Independent Overseas Student visa.

2 2 That visa was granted to the appellant on 7 November 2007 based on his assessed skill as a pastry cook. In support of the visa application the applicant provided a work reference from Bakers Hut Bread Supplies which certified that the applicant had:

“undertaken unpaid work experience in our bakery from 11/04/06 till 20/01/07. Over this period of time he contributed to our business with more than 900 Hours”.

3 The work reference was submitted to Trades Recognition Australia (TRA) which then assessed the appellant's skill as sufficient to qualify for the visa. The appellant submitted the TRA skills assessment in support of the visa application.

4 On 16 July 2010 the appellant was notified that the delegate of the Minister was considering cancelling the visa because the Department of Immigration and Citizenship had information that the work reference was false, was procured by the payment of money, and that the applicant had not worked for Bakers Hut Bread Supplies at all.

5 The *Migration Act 1958* (Cth) (the Act) provides that a visa applicant must not give a bogus document in support of a visa application (s 103). The Minister has power to cancel the visa if the applicant contravenes that provision. But the Minister must give notice of the contravention under s 107 before a visa can be cancelled under s 109. The notice must describe the way in which the applicant failed to comply with the Act. In the present case the appellant's visa was cancelled because he provided a bogus document in support of his visa application. The question is whether the notice, properly construed, made an allegation of that contravention.

RELEVANT STATUTORY PROVISIONS

6 Section 103 provides:

A non-citizen must not give, present or provide to an officer, an authorised system, the Minister or a tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented or provided.

7 Section 97 defines a bogus document as follows:

In relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

8 Section 107(1) relevantly provides:

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa ... did not comply with section ... 103 ...the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice ...

9 9 Section 108 provides:

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

10 10 Section 109(1) provides:

- (1) The Minister, after:
- (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
- may cancel the visa.

THE NOTICE

11 11 The notice provided to the appellant under s 107 of the Minister's intention to consider cancellation under s 109 relevantly stated:

This letter refers to your subclass DD 880 – Skilled – Independent Overseas Student visa which was granted on 7/11/2007.

As a delegate of the Minister for Immigration and Citizenship, I consider that you did not comply with sections 101(b) and 103 of the *Migration Act 1958* ('the Act').

If you did not comply with section 101(b) and 103, your visa may be cancelled.

Particulars of the possible non-compliance:

On the material presently before me, I consider that there has been non-compliance with the following sections of the *Migration Act 1958*:

...

Section 103. Bogus documents not to be given etc.

...

By operation of s 99 of the Act, not only must there be no incorrect answers on the application form itself, there must also be no incorrect answers in any information that a non-citizen gives, causes to be given or that is given on his or her behalf (whether in writing or orally) to the Minister, an officer, an authorised system or a person or tribunal reviewing a decision under the Act in relation to the non-citizen's application for a visa.

...

In your application you submitted a work reference dated 29/01/2007 signed by Deniz Kordemir the former owner of Bakers Hut Bread Supplies. The beginning of his letter reads 'This is to certify that Mr Jagmeet Singh Kang (D.O.B 02/10/1986) has undertaken unpaid work experience in our bakery from 11/04/2006 to 20/01/2007. Over this period of time he contributed to our business with more than 900 hours.'

...

Section 103. Bogus documents not to be given etc.

103. "A non-citizen must not give, present or provide to an officer, an authorised system, the Minister or a tribunal performing a function or purposes under this Act, a bogus document or cause such a document to be so given, presented or provided."

Section 97 of the Act defines a bogus document, for the purposes of the Act, as follows:

Bogus Document

In relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly;

At the time of your visa application you were required to meet regulation 880.230 at time of decision, which stated in part:

880.230

- (1) A relevant assessing authority has assessed the skills of the applicant as suitable for his or her nominated skilled occupation, and

no evidence has become available that the information given or used as part of the assessment of the applicant's skills is false or misleading in a material particular.

As a result of this regulation, you had your skills assessed by Trades Recognition Australia (TRA), the relevant assessing authority for your nominated occupation. As part of this assessment, you submitted evidence to TRA that you had 900 hours of work experience in this occupation.

On 20/04/2007, your skills were assessed and recognised by TRA as a Pastrycook....

Based on the positive TRA skills assessment that you provided to the Department, you were awarded 60 points as a skilled occupation on the required points test for your visa. The 60 points enabled you to meet the pass mark of 120 points necessary for grant of the permanent visa, as defined by regulation 880.222:

880.222

The applicant has the qualifying score when assessed in relation to the visa under Subdivision B of Division 3 of Part 2 of the Act.

Note That Subdivision of the Act provides in sections 92 to 96 for the application for a points system, under which applicants for relevant visas are given an assessed score based on the prescribed number of points for particular attributes, which is assessed against the relevant pool mark and pass mark. The prescribed points and the manner of their allocation are provided for in Division 2.2 (see regulation 2.26A), and Schedule 6A, of these Regulations. Pool marks and pass marks are set from time to time by the Minister by notice in the *Gazette* (Act, section 96).

As part of an ongoing investigation by the Department, adverse information regarding your claimed work experience was obtained. As part of this investigation a previous employee of Bakers Hut Bread Supplies was contacted regarding the work reference you provided.

The previous employee of Bakers Hut Bread Supplies made admissions that this business prepared fake work references for students and charged money for these references when the student had not completed 900 hours of work experience with them.

The work reference you provided from Bakers Hut Bread Supplies therefore purports to have been, but was not, issued in respect of the person, in this case, you.

It meets with the definition of a bogus document within the meaning of section 97 of the Act.

I consider that you used this bogus document to obtain a positive assessment from TRA.

The skills assessment from TRA was therefore obtained because of a false or misleading statement, whether or not made knowingly. By this definition the TRA skills assessment is also a bogus document within the meaning of section 97 of the Act.

You then **presented this bogus skills assessment to an officer of the Department** who was performing a function under the Act (that function being assessing the client's visa application).

In giving the TRA skills assessment, which is a bogus document to an officer of the department, you have failed to comply with s 103.

I consider therefore that you have not complied with Section 101(b) and 103 of the Act because in support of your application and in order to satisfy the legislative requirements for grant of a visa, you have made incorrect statements, provided incorrect information and caused a bogus document to be given to the department. (Emphasis added.)

THE DECISION OF THE TRIBUNAL

12 12 The Tribunal determined to set aside the cancellation of the visa because of certain deficiencies in the notice relating to the alleged contravention of s 103. The Tribunal first addressed the alleged contravention based on the appellant's provision of the work reference and said:

42. As indicated above, the delegate described, in the NOICC [the notice], the way the review applicant [appellant] breached the obligation to not provide bogus documents by characterising the work reference as a document which purported to have been, but was not, issued in respect of the person in contravention of sections 103-97(a).
43. However, the Tribunal considers that, in doing so, the delegate mischaracterised the work reference and the nature of the suspected breach of section 103.
44. Section 97(a) operates to catch documents that purport to have been, but were not, issued in respect of the person for example, a false passport purports to have been issued by the passport authorities in respect of the person but was not issued by those authorities in respect of that person. A driver's licence purports to have been issued in respect of the person by the drivers' licence authority but was not issued by that authority in respect of that person.
45. The work reference was not *purported* to have been issued in respect of the review applicant – it *was* issued in relation to him, albeit quite probably containing false information.
46. Furthermore, the reference was not submitted to “an officer, an authorised system, the Minister, or a tribunal performing a function or purpose under this Act” (Section 103) – it was submitted to TRA.
47. In conclusion, it is not open to the Tribunal to find that the first particularisation of bogus documents has been established.

13 13 The Tribunal then addressed the alleged contravention of s 103 based on the appellant's provision of the TRA skills assessment. The Tribunal said:

48. The evidence in relation to bogus documentation supports, prima facie, a finding of non-compliance by the review applicant by providing the false work reference to TRA which was then relied upon by TRA to issue a favourable skills assessment which the review applicant then submitted to the Department in contravention of sections 103-97(c). However, this incident of alleged non-compliance with section 103 by the review applicant was described in the s.107 notice as:

... you then presented this bogus skills assessment **to an officer** of the Department ... (The Tribunal's emphasis)

49. There is no evidence to support the finding that the review applicant presented the bogus skills assessment to an officer. It was lodged on line to an authorised system and accordingly not given to "an officer".

14 14 The notice stated that the TRA skills assessment had been given to an officer of the Department when in fact it had been lodged online. The Tribunal applied the judgment of the then Federal Magistrates Court in *Brar v Minister for Immigration & Anor* [2011] FMCA 435. The non compliance alleged was erroneous in that it stated that the bogus document was given to an officer when in fact it had not been given to an officer. Hence, the notice could not support the cancellation of the visa because the contravention had not been properly articulated.

THE JUDGMENT OF THE FEDERAL CIRCUIT COURT

15 15 The Minister applied to the Federal Circuit Court for a review of the Tribunal decision.

16 16 By this time the Full Court of the Federal Court had reversed the judgment of the Federal Magistrates Courts in *Brar*. In accordance with the Full Court judgment *Minister for Immigration and Citizenship v Brar* [2012] FCAFC 30 (*MIAC v Brar*) the Federal Circuit Court upheld the Minister's contention that the error in the notice of the description of the recipient of the visa application as "an officer" did not prevent the notice from supporting the allegation of contravention.

17 17 The appellant however contended that there were other reasons why the cancellation decision should not stand. The principal allegation made in the notice of a contravention of s 103 was that the TRA skills assessment was a bogus document. The

appellant, however, contended that the TRA skills assessment did not fall within the definition of a bogus document under s 97.

18 18 The Federal Circuit Court dealt with this argument in a section entitled “The Applicant’s Submissions in Reply” as follows:

79. Mr Horan [Counsel for the Minister] submits that the NOICC [notice] identified the bogus documents as “the reference from BHBS” [Bakers Hut Bread Supplies] within the definition in s.97(a) (CB p.39.3), and “the TRA skills assessment” within the definition in s.97(c) (CB p.39.5). The Court accepts that submission.

80. Mr Horan refutes Mr Young’s [Counsel for the appellant] submission that, if the BHBS reference was not a “bogus document”, the TRA skills assessment could not be a bogus document. All that is required for the TRA skills assessment to be a bogus document under s.97(c) is that i[t] was obtained by a false or misleading statement, whether or not made knowingly. Mr Horan correctly identified that the false and misleading statement in the TRA skills assessment was that the applicant “has undertaken unpaid work experience in our bakery from 11/04/06 till 20/01/07. Over this period of time he contributed to our business with more than 900 Hours” (CB p.33.1). That statement was included in the work experience reference supplied by BHBS, which was supplied to the Department by TRA as part of its Record of Assessment (CB p.31.2). At CB p.37.8 the NOICC indicates that “Information received indicated that you may have never worked at Bakers Hut Bread Supplies as claimed”. Enquiries were made by the Melbourne Investigation Team with BHBS (the Court does not find the admissions by previous employees to be relevant here because of the Notation to the orders of FM Cameron [CB p.188.10]).

81. Mr Horan complains that the Tribunal did not deal with the second alleged bogus document (being the TRA skills assessment). The Court accepts that submission (CB p.236.2).

19 19 The Federal Circuit Court determined that the Tribunal had failed to consider the grounds of non compliance alleged in the notice. Rather than determine whether the notice properly described a non-compliance with s 103, the Federal Circuit Court concluded that the matter should be remitted for further hearing by the Tribunal because the Tribunal had not considered that issue.

20 20 The Tribunal therefore did not directly determine the question whether the notice properly described a non-compliance with s 103 in a way which would support the cancellation of the visa. Nonetheless, the parties agreed that the issue currently to be agitated on the appeal was raised, and was, in effect, determined. They accepted that it is not a new issue that requires leave to argue for the first time on the appeal.

THE APPELLANT'S ARGUMENT

21 21 The appellant contended that the notice of intention to cancel could not support the visa cancellation in this case. The Minister did not challenge the Tribunal determination that the work reference was not a bogus document. This was for the reason explained by the Tribunal that a bogus document is a document that purports to have been, but was not issued in respect of the person. The work reference was issued in respect of the appellant. Whether correct or not, the Minister felt constrained to accept this finding for the purpose of the appeal. The notice then went on to allege that "you used this bogus document to obtain a positive assessment from TRA."

22 22 The fact that the work reference was a bogus document was linked to the allegation of noncompliance. In view of the acceptance that the work reference was not a bogus document, there was, so it was argued, no valid allegation of noncompliance.

23 23 In the appellant's written submissions the argument was put thus:

18. [T]he NOICC particularises linked allegations:

- a) The first and central particular relates to a work reference which purported to have been but was not issued in respect of the appellant. The work reference was therefore a bogus document.
- b) It is alleged the Appellant used the bogus document to obtain a positive assessment from TRA. This made the TRA assessment a bogus document because it was obtained because of a false or misleading statement (being the false or misleading statement that it purported to be but was not about him).
- c) He presented the TRA skills assessment to an officer of the Department.

19. No particular was provided of any breach of s 103 by reason that the work reference contained incorrect information about the Appellant or his work history with Bakers Hut Bread Supplies.

20. The gist of the s 103 breach allegation is that the work reference purported to be but was not issued in respect of the appellant.

THE MINISTER'S ARGUMENT

24 24 The Minister, however, contended that the noncompliance concerning the TRA assessment was not linked to the provision of the work reference, but was an independent allegation of noncompliance. The allegation was that the TRA skills assessment was a bogus

document within the meaning of s 97(c) in that it was obtained because of a false or misleading statement. The false or misleading statement was that the appellant had worked from 11 April 2006 to 20 January 2007 for over 900 hours at Bakers Hut Bread Supplies when he had not done so. This was clear from the sentence which introduced the particulars of contravention of s 103, as follows:

The previous employee of Bakers Hut Bread Supplies made admissions that this business prepared fake work references for students, and charged money for these references when the student had not completed 900 hours of work experience with them.

25 25 And then the notice also stated:

In giving the TRA skills assessment, which is a bogus document to an officer of the department, you have failed to comply with s 103.

CONSIDERATION

26 26 The approach to the construction of such a notice was explained in *MIAC v Brar* at [61], as follows.

In our opinion, it was not Parliament's intention that all departures from the statements made in a notice under s 107 deprive the decision-maker of jurisdiction under ss 108 and 109 to making findings of non-compliance by the visa holder in the way described in the notice. The phrase "in the way described in the notice" must be read in light of the purpose of the statutory scheme which is **to ensure that the visa holder has notice of the alleged non-compliance** and an opportunity to dispute the allegations and to respond to them. **A departure which is minor and insignificant in the context of the facts of a particular case and which does not go to the substance of the allegations of non-compliance does not deprive the decision-maker of jurisdiction under ss 108 and 109.**
(Emphasis added.)

27 27 The sentence in the notice relied upon by the Minister has two aspects. One concerns the admission about the provision of the work reference. The other concerns the substance of the reference, namely, the false claim that the person had completed 900 hours of work experience.

28 28 The Minister submitted that, to the extent that the allegation of noncompliance is unclear, the fault is minor. This argument should be accepted. The notice could have set out the allegation of contravention constituted by the provision of the TRA skills assessment a little more clearly by shifting the description of the false or misleading statement relied

upon to a position in the notice nearer to the allegation of contravention by provision of the TRA skills assessment.

29 However, the appellant would have been under no misapprehension that the false or misleading statement alleged was that he had worked for 900 hours for the referee. The appellant would not have apprehended that the false or misleading statement alleged was only that he had provided a work reference which purported to be issued in relation to the appellant but was not. This is an artificial reading of the notice

THE FORM OF THE ORDERS

30 In the end there was common ground, that [2] of the order of the Federal Circuit Court should be varied. That paragraph provided:

A writ of mandamus issue requiring the Migration Review Tribunal to determine the matter according to law, including making findings on the matters in the Notice of Intention to Consider Cancellation; in particular:

- a. That the visa holder did not comply with ss.101(b) and 103 of the *Migration Act* 1958 because, in support of his application and in order to satisfy legislative requirements for the grant of a visa, the visa holder made incorrect statements, provided incorrect information, and caused a bogus document to be given to the Department; and
- b. Including considering whether or not to exercise the discretion to cancel the visa.

31 It was agreed that the words after “according to law” should be deleted.

COSTS

32 The appellant sought his costs of the appeal. He contended that he obtained the essential relief which he sought, namely the variation of [2] of the order of the Federal Circuit Court.

33 This submission should not be accepted. The argument on the appeal involved no attention being given to this ground, because the Minister indicated, at the earliest possible time at the hearing, that he would not object to the variation sought. The Minister did not concede that the order was erroneous. He accepted that it made no real difference to delete the latter part of the order. If it was thought by the appellant to make the issue clearer then

the Minister was not prepared to stand in the way of that course being taken. That is hardly a foundation for ordering costs in favour of the appellant. On the substance of the appeal, the appellant failed, and should pay the Minister's costs.

34 34 The appellant also sought an order for costs of the proceeding before the Federal Circuit Court. There was no error identified in the reasons of the Federal Circuit Court, and the orders for costs should not be altered.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice North.

Associate:

Dated: 19 July 2013